ORIGINAL

In the

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES et al., Petitioners, v. BRIAN F. WEBER et al., Respondents.	)	No. 78-432 78-435 and 78-436

Washington, D.C.
March 28, 1979

Pages 1 thru 70

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner :

v. : No. 78-432

BRIAN F. WEBER ET AL., :
Respondent :

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner :

v. : No. 78-435

BRIAN F. WEBER ET AL., :
Respondent :

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and

UNITED STATES ET AL,
Petitioners :

v. : No. 78-436

BRIAN F. WEBER ET AL, :
Respondent

- x

The above-entitled matters came on for argument at 10:03 o'clock a.m.

March 28, 1979
Washington, D. C.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice

THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

NOYES THOMPSON POWERS
Washington, D. C., on behalf of Petitioner
Kaiser Aluminum & Chemical Corporation

MICHAEL H. GOTTESMAN,
Washington, D. C., on behalf of Petitioner
United States Steelworkers of America, AFL-CIO-CLC

LAWRENCE G. WALLACE
Office of the Sol. Gen., Department of Justice,
Washington, D. C., on behalf of Petitioner
United States, et al.

MICHAEL R. FONTHAM
New Orleans, Louisiana, on behalf of Respondent
Brian F. Weber, et al.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 78-432, United Steelworkers against Brian Weber, and the consolidated cases.

Mr. Powers, you may proceed whenever you are ready.

ORAL ARGUMENT OF NOYES THOMPSON POWERS

ON BEHALF OF PETITIONER KAISER ALUMINUM & CHEMICAL CORPORATION

MR. POWERS: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the Fifth Circuit. And the issue is whether Title VII of the Civil Rights Act of 1964 permits an employer and a union to remedy the past exclusion of minorities and women from craft employment by establishing a new craft training program which takes account of race and sex in selecting those to be trained.

Let me begin by stating one central fact. The provisions of the 1974 Kaiser Steelworker labor agreement, which are being challenged in this case, were a remedial measure adopted in response to employment discrimination litigation concerning the lack of minorities and women in craft employment. Those are not simply my words. They are contained in the provisions of the labor agreement itself, and they appear in paragraph 5 of Plaintiff's Complaint in this case, which is reprinted in the Appendix of page 11, and they were renewed not only by the

Company but by the Union in its answer to the complaint, which appears on page 17 of the Joint Appendix.

So the character of the program is not really in dispute. It was re-named, and it sought to do more than remedy for achieved racial balance for society's sake. The program was explicitly focused in response to employment discrimination litigation in which both Kaiser and Steelworkers were then engaged.

To meet the situation, the Kaiser-Steelworker Agreement established a new program at 15 Company plants under which Kaiser employees who had no prior craft experience could achieve training. And, as was being done in the Steel Consent Decree, to which the Steelworkers were a party, the agreement provided that 50 percent of the training opportunities would be allotted to minorities and women.

One of those 15 plants is the Gramercy, Louisiana plant and which is the site of this litigation.

It is important to emphasize that the Company's desire to assure compliance with its Title VII and its Executive Order obligations were not simply involved in the establishment of the 1974 program, they were the reason for it. If the Company had been able to recruit what it regarded as adequate numbers of minorities and women who were already equally trained, they would have had ever reason to continue to take advantage of its ability to recruit fully-trained craftsmen

and save a substantial cost that the training involved.

As is clear from the record, at the Gramercy plant alone, by agreeing to this training program, the Company undertook an obligation that could be expected to cost it up to $400,000 a year.

Now, this training program provided opportunities not only for Blacks and women, but for white males who had no prior craft experience. The Respondent, Brian Weber, was one of those employees who had no prior craft experience.And when opportunities came to bid in this new craft training program, he bid. And when he was not selected, he filed a charge under Title VII alleging that he was being discriminated against because Blacks less senior than he had been selected.

The lower courts--

QUESTION: Mr. Powers, I want to be sure that Kaiser is or is not admitting past discrimination?

MR. POWERS: Kaiser does not admit past discrimination. It does concede that both the substantial level of employment of minorities and women in craft jobs at the time and the fact it had insisted on prior experience as a condition not only for employment as a full craftsman, but also for entry into training programs, were factors that a Court might have used in finding that there was a prima facie case of discrimination.

QUESTION: Beyond this, Kaiser does not go?

MR. POWERS: Kaiser does not concede discrimination under Title VII. It does not concede that the Executive Order required this action.

QUESTION: I don't know -- do you concede that the figures would have made out a prima facie case requiring Kaiser to come forward with some explanation?

MR. POWERS: We certainly would concede that it is arguable and I think the Fifth Circuit's decision in force against Kaiser which involved a neighboring plant of Kaiser to the Gramercy plant, and one that was also subject to this 1974 agreement, shows that Courts could reach that conclusion.

QUESTION: I'm not asking whether ultimately you concede that you could not make out any defense. But do you concede that these figures would make a prima facie case that would require you to come forward?

MR. POWERS: I don't concede that there is a prima facie case. We do recognize that there are the elements that a Court might use to find such a prima facie case.

There are two points that we have to stress at this time: In our judgment, the standard which the Fifth Circuit adopted and which the lower court and which the Respondents argued for, that there must be a proof of prior discrimination and an identification of the victims of that discrimination will literally end affirmative action. If that is the price employers and unions must pay in order to try to remedy the

exclusions of the past, it is, in our judgment, prohibitive.

Secondly, we consider that the type of remedial action that was taken in this case is consistent with the standards which a majority of this Court approved in the Bakke Case and are otherwise reasonable.

QUESTION: The Bakke Case really has nothing to do with this one. The Bakke Case was decided by a majority of the Court on the equal protection clause under the Fourteenth Amendment, which is wholly inapplicable here, isn't it?

MR. POWERS: We believe, Your Honor, Mr. Justice Stewart, that the standard is no stricter for proving race-conscious action--

QUESTION: Our problem here as lawyers and judges is quite different, isn't it? It doesn't involve the equal protection clause in the Fourteenth Amendment at all.

MR. POWERS: I does not involve the equal protection clause.

QUESTION: It involves the 1964 Act of Congress.

MR. POWERS: That is correct.

QUESTION: It is pretty clear -- it's entirely clear, I suppose, that, setting to one side the post Civil War legislation, that until 1964 your client could have had a training program for all white people, all women, all Negroes, or all anything else, and it's only because of this Act of Congress that this lawsuit arises; isn't it?

MR. POWERS: That is correct.

QUESTION: Nothing to do with the Constitution?

MR. POWERS: That is our position.

QUESTION: Well, that's clear, isn't it? Isn't that conceded? That is not only your position, that's the fact of the matter, isn't it?

MR. POWERS: Yes, we agree with that.

QUESTION: And really the very narrow question, you could have done this, as my brother Stewart said, before 1964?

MR. POWERS: There's no question.

QUESTION: The only narrow, and very narrow question is whether the 1964 Act permits you to do it?

MR. POWERS: That is correct.

QUESTION: That's all there is to the case.

MR. POWERS: In our judgment--

QUESTION: Isn't that all there is to the case?

MR. POWERS: I believe it is all. And we would say, furthermore, Your Honor, Mr. Justice Brennan, that we believe, far from prohibiting this type of action, we believe that Title VII encourages it.

QUESTION: Mr. Powers, supposing that the answers you have given to my brother White's and Blackmun's questions previously were different, that there wasn't even any arguable showing that your Company had discriminated in the past, do you think the program you instituted in 1974 would be permissible

under Title VII?

MR. POWERS: We believe that Title VII may require employers to take action which prevents them from importing into their own work force discrimination which others have -- are responsible for. We believe that that is certainly the way the Executive Order seems to have been interpreted and upheld.

QUESTION: Title VII isn't the Executive Order, is it?

MR. POWERS: It is not. But it is our understanding that the two are to be construed -- are to be reconciled. And as we read the legislative history of Title VII and the '64 legislative history, Congress was aware that there was an Executive Order and it sought to provide that that program, including the affirmative action elements of it, would be allowed to continue.

QUESTION: So you say that even though nobody could have made out even a prima facie case of discrimination against your Company in court, nonetheless, this agreement was permissible under Title VII?

MR. POWERS: Well, my point is this: That we--

QUESTION: Can you answer the question?

MR. POWERS: Yes, sir. My difficulty is simply, in responding to you as to whether or not the employer can be charged with discrimination when he acts in such a way that brings the practices of others into his own workplace. Some would say that that creates a prima facie case of discrimination

on the part of that employer. It isn't what the employer has initiated, but what he perpetuates in his workplace.

To the extent that that creates a prima facie case of discrimination, then that is the situation that's comparable to the one in which Kaiser found itself. It was trying to utilize the experienced craftsmen trained by others under conditions which, it seems to me, were clearly recognized as being discriminatory.

QUESTION: You think to the extent it creates discrimination, what's your position as to whether it does or does not create that situation?

MR. POWERS: I come back to my first answer to Mr. Justice White. We deny that the Company discriminated. We recognize that there are questions as to whether certain conduct may be regarded as creating a prima facie case of discrimination that requires justification. We think that employers and unions must be allowed to take this kind of remedial action, recognizing that the outcome of litigation may be in doubt.

QUESTION: The employers and unions could do it if Congress would let them do it. Is that not so?

MR. POWERS: We believe that the Congress could specifically authorize this type of action. It is our position that it did not prohibit it.

QUESTION: Suppose, for example, Congress had a statute -- which I won't try to draft a statute here -- but

something to this effect: That provided, however, applying to all existing statutes, that nothing in these statutes would prohibit the employer unilaterally or by contract with the union from agreeing to carry out a program of the kind you have here, with preferential treatment to minorities who have been denied equal opportunity in the past, in order to remedy that. Now, there wouldn't be any State action in that, would there?

MR. POWERS: Well, I suppose that legislation would have to pass the equal protection standards. We believe that if an adequate basis was laid--

QUESTION: Do you think that would run afoul of any constitutional prohibition?

MR. POWERS: Well, I mentioned the equal protection question. It seems to me if there is an adequate basis in finding that this remedial action is necessary, it would be upheld.

QUESTION: I was thinking of the statutory recitals of past discrimination and exclusion including the long-standing union activities that prohibited minorities, particularly, Negroes, from getting into apprentice programs, or even membership in the union.

MR. POWERS: We would think that would be constitutional.

Mr. Chief Justice, I would like to defer the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Powers.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN

ON BEHALF OF PETITIONER UNITED STATES STEELWORKERS OF AMERICA, AFL-CIO-CLC

MR. GOTTESMAN: Mr. Chief Justice, and may it please the Court:

The cast that's here today reflects one small part of what was a nationwide program undertaken by the Steelworkers Union in 1974. In that year, it negotiated not just with this Company, and not just with this industry, but with all the major industries the union represented. A program similar to this at every plant providing that where a racial imbalance exists as between the production jobs and the crafts jobs, a quota would be instituted wherein 50 percent of those jobs, the craft jobs and craft training jobs to minorities until that imbalance had been eliminated.

The union has since reconfirmed its commitment to that program in three successive conventions despite arguments against that program from delegate Brian Weber, at the most recent convention, which followed the Tenth Circuit's decision in this case. And the union is most anxious to sustain as lawful its right to negotiate contracts of this type.

Now, the union's view as to what Title VII permits is somewhat different from that of the Company. And it's

broader. In our view, Congress, in prohibiting discrimination in Title VII, did not intend to prohibit any form of, and I'm going to call it, affirmative action. Congress did not intend to take from private employers and unions the right to adopt a program wherein they had a segregated workforce, regardless of whether that segregation was their own fault, the fault of other societal factors, and without the need of having to conduct a major investigation to trace just what the cause of that segregation was. That the mere existence of that segregation was an undesirable phenomenon which that Company and Union could address.

QUESTION: Mr. Gottesman, let me ask you this: Suppose that when Title VII was adopted there was an employer who said to himself, "I think just to be fair, I'm going to have my workforce mirror the racial composition of the community insofar as Blacks and whites are concerned"? Suppose it was 70-30, and he hired on that basis all the time, and he maintained as nearly as he could 70-30. Then Title VII occurred. I take it your position would be that that would not be invalid under Title VII?

MR. GOTTESMAN: No, on the contrary, we think that would be, so long as permissive action is merely a standard. It is not that an employer and union can opt as a permanent matter forever to hire on a racial basis. It is not that they can maintain a racial balance for its own sake.

QUESTION: You are still opposing it then as a remedy?

MR. GOTTESMAN: In the sense that a segregated workforce is a bad thing to have, it's something you ought to be able to remedy. But not necessarily remedial in the sense, "We've committed a sin, therefore, we have to correct it."

QUESTION: Is there any history, Mr. Gottesman, of this Union having done as many unions did, the trade unions, for example excluding Negroes, particularly, from membership in the union ?

MR. GOTTESMAN: On the contrary, Your Honor, it's history is it was built with Black members first. And in the 1930's and 40's, when it was against the law in the South to conduct integrated meetings, the leadership of this union was dragged off to jail every month because the union refused to hold segregated meetings, even though the law required it. And there is no history, and this is important to our problem, it was completely interracial. There's no question about it from the start, this union never segregated in any respect. Never. Nor is there any question that this union had no responsibility for the picture of exclusion from the craft. Unfortunately, the companies would not give the union a voice in crafts elections. So the union didn't have the opportunity, even if that had been its intent, to commit discrimination.

The union has been fighting for years, as this record

shows, to get this Company to institute training programs, so that whites and Blacks in the plant would be able to qualify for the craft jobs.

QUESTION: There is no doubt, is there, that quite a number of unions had a systematic exclusion in past years in this respect?

MR. GOTTESMAN: I think, Your Honor, it is not correct in industrial unions. There are findings by courts that some of the building trade unions had that. I have no personal knowledge of that. I know that courts have so found.

And companies testified at the trial that the only reason was they could not find Black craftsmen when they went out to hire.

There was a union that provided training in Louisiana prior to 1974 had not trained Blacks. So this element of societal discrimination is the source--

QUESTION: It had just not trained them or had excluded them from membership, which?

MR. GOTTESMAN: Well what they testified was that they had not provided them training. They didn't have trained Black craftsmen in the community.

QUESTION: That wasn't true of your union, I take it?

MR. GOTTESMAN: Our union took into membership whoever the companies hired. We don't train people. The membership

of the industrial unions generally, and the Steelworkers particularly, is the employees of that plant the union represented.

QUESTION: A union shop type of deal?

MR. GOTTESMAN: Union shop, and the union's membership reflects whoever the company chooses to hire. And the union doesn't conduct their training program. The union negotiates to get the employer to adopt craft training programs as one of the benefits it provides to its employees.

Now, if I may, our position is a little broader in terms of what we say Congress allows to private parties. Our position is that wherever you have a segregation in your workforce, you may adopt a temporary quota to eliminate it and the desirability to convince those Courts that Congress did leave that area unregulated in '64.

As Mr. Justice Stewart has pointed out, there is no question that until 1964, companies and unions could do this.

QUESTION: Then you would agree with your colleague who just said that Congress could easily clarify this?

MR. GOTTESMAN: Well, no matter what this Court does, Congress can easily clarify it if this Court's decision doesn't coincide with what Congress believes to be the right result. The question is, at this moment in time with the statute now on the books, what can we discern to have been Congress' intent today.

And then we look at the history of Title VII. The decision that Congress made in '64 was not to take the choice to have programs such as this from the private sector. There was some language that Section 703(a) and (d) do indeed say it would be an unlawful employment practice to discriminate against individuals in employment and in training. And so I suppose the ultimate question is: What did Congress mean when it used the word "discriminated"?

QUESTION: Under the present statute, could an employer lawfully announce and execute a program saying that he would hire approximately 50 percent people who had been convicted of criminal acts and were released either on preliminary parole or permanently released?

MR. GOTTESMAN: This statute only prohibits discrimination on the basis of sex, race, national origin--

QUESTION: So in that range of 50 percent you would get a wide range of racial groups, wouldn't you,ethnic groups?

MR. GOTTESMAN: Sure.

QUESTION: There would be no prohibition; an employer could do that?

MR. GOTTESMAN: I would think, unless it were a subterfuge for some type of invidious discrimination.

QUESTION: I'm sorry. I was hypothesizing an employer who consciously and deliberately wanted to try and help rehabilitate people who had been--

MR. GOTTESMAN: There is nothing in this statute that precludes that, Your Honor, as I understand it.

QUESTION: Is there any other statute that you know of?

MR. GOTTESMAN: I can't say that I do. But I don't have confidence that I know all the statutes that might come into play. There has been evidence in the legislative history that when Congress moved, it had in mind what some people call "invidious discrimination", not just the literal sense, there is a choice to make in an act of discrimination.

Congress talked about acts of ugliness and intolerance, bigotry, bias, prejudice as the kinds of acts that this statute was directed at. But more than just their own obvious ambiguity in the word "discriminate" in 703(a) and (d), and you want to look at the legislative history, in any event, to find out what Congress intended--

QUESTION: Mr. Gottesman, I know that your ultimate position is this simply is not a violation of Title VII of the 1964 Act, but, despite what you have just told us, isn't it, on its face, prima facie a violation? It is an evident discrimination against white people, isn't it?

MR. GOTTESMAN: Well, it is a race conscious decision which--

QUESTION: In training.

MR. GOTTESMAN: --which requires the selection of

Blacks rather than whites in certain instances.

QUESTION: Which is--

MR. GOTTESMAN: In the literal sense, it is discrimination.

QUESTION: So what you have said, I assume, in a lawsuit would be defensive; wouldn't it? And a Plaintiff, be it Mr. Weber or any other plaintiff similarly situated, could bring a lawsuit. This is a prima facie color violation and what you said would be a complete defense; is that correct?

MR. GOTTESMAN: Well, one could say it that way. Our defense though would be no more than simply saying that we have a segregated workforce and we have adopted a quota which does no more than eliminate that.

QUESTION: Precisely.

MR. GOTTESMAN: And that is not -- once we have shown that, that is not discrimination as Congress intended that term.

QUESTION: Well, whether it may be or may not be discrimination, it is not a violation of Title VII; is that it?

MR. OGTTESMAN: Okay. Correct. That is correct.

QUESTION: How much is left of McDonald if you prevail?

MR. OTTESMAN: McDonald prohibits the kind of discrimination against whites that Congress passed this statute

to prohibit against Blacks. Acts of ugliness, intolerance, bigotry, bias, prejudice.

The legislative history shows, and the legislative history from which this Court found in McDonald--

QUESTION: What you're saying, under your theory, you can discriminate for a good motive; you can't discriminate for a bad motive?

MR. GOTTESMAN: Well, it's not so much the motive, there are certain acts taken in certain circumstances which Congress did not intend to forward in theprohibition of this statute.

And there is another provision on the face of this statute terribly important to that assessment, and that is 703(j), in which Congress said, "Nothing in this Act requires an employer and the union to adopt a quota to eliminate racial imbalance."

Now, while it may not be definitive that it's worded that way, it's hard to believe that the drafters of that provision, if they thought it would be unlawful to adopt a quota, would have chosen a set of words "Nothing in this Act requires an employer and union" to do it.

QUESTION: Wouldn't it have been quite easy for Congress to express these concepts in the terms I outlined in a very rough suggestion of a statute?

MR. GOTTESMAN: It would have been easy, Your Honor.

It would have been easier for both us and the Court if they had done so. But we suggest that, indeed, in the legislative history the principal sponsors made clear that that is, in fact, what they intended.

Now, it's an important dynamic to understanding that legislative history that the balance of power here was held by a group of conservative Congressmen whose votes were critical and who normally were resistant to Government regulation of business. And who stated it as a credo, this is the price of support for this Bill. "Look, these are evils and we want to eradicate these evils, and we are prepared to vote with you to do so. But we have got to do so with the minimum intrusion necessary upon management prerogatives and union credos. And since this, what we are doing here, was not the evil which was in Congress' sights when it enacted this statute, it was not the view of these people that the freedom which employers and the union previously had to adopt a program like this would be taken away.

And the most compelling answer to that was the explanation provided by Representative McGregor, who was one of the leading House Members of the Judiciary Committee shepherding this Bill through, and he spoke literally moments before the vote on this Bill. And, indeed, on the same day the Bill was enacted and signed by the President, he said, "As important as the scope and extent of this Bill is, it is

vitally important that all Americans understand what this Bill does not cover." And then he listed the areas of racial balancing in public schools and preferential treatment or quotas in employment. And I'm going to come back to that linkage. And he said, "There is a mistaken belief that Congress is legislating in these areas in this Bill. When we drafted this Bill, we excluded these issues."

He went on to say, "These are controversial."

QUESTION: Then why did you answer me awhile ago the way you did, that an employer with a racially balanced work-force would be violating Title VII?

MR. GOTTESMAN: I'm not sure I said he would be--

QUESTION: You said he was. I asked you--

MR. GOTTESMAN: I may have over-stated my view. That is a totally different question from whether you can do what we're doing.

QUESTION: Well, it may be, but the words you are reading there, read on my example too, don't they?

MR. GOTTESMAN: Well, except I think -- what Congressman McGregor said was that Congress had spelled out -- the Senate had spelled out in 703(j) our intentions more specifically. And what 703(j) said was not -- did not address maintaining racial balance. It said nothing in this statute will require you to adopt a quota to eliminate a racial imbalance.

And so what Congressman McGregor was saying is that's

the area we have carved out and left to the private sector. We have done so not because we think it's necessarily good or necessarily bad, but because it's controversial and we decided not to take that choice away from where it has traditionally resided -- in the hands of employers and unions.

Now, if I can be allowed, and I know I am at my end, 30 seconds to note the posture in which this case is really before this Court. There is a lot of evidence cited in our brief that Congress thought this to be a controversial issue and concluded, therefore, not to embrace it within this Bill. Leave it where it had been.

There have been a lot of briefs filed with this Court suggesting cutting lines, whether you should be allowed to have affirmative action in this circumstance but not that one, all very credential lines. But, we submit, not lines that this Court should be drawing, but lines Congress should be drawing. Congress said in '64 private parties are free if they choose to have affirmative action programs. If Congress becomes dissatisfied with what those private parties are doing, Congress is free to draw some lines. But we submit that it is not for this Court to draw them; it's for this Court to discern if we have accurately read the legislative history, that Congress made a deliberate judgment in '64, "We shall not regulate." This is not a Bill to prepare affirmative action; this is a Bill to correct some real evils, and we've got this other controversial

question, and we choose to leave it for the time being where it was, in private hands.

And on that basis, we submit, all affirmative action programs of this type are lawful.

QUESTION: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF PETITIONER UNITED STATES

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

The United States agrees that the plan at issue before the Court is a valid plan, but there are many differences between our position and that of the Union. We also agree that the issue is a statutory issue reconciling the broadly-worded prohibitions of Title VII with the statute's remedial purposes and its emphasis on voluntary compliance. However, we believe it would be a mistake to read the language of Title VII, which was drafted in 1964, and the many thousands of pages of legislative history as dealing with the question of voluntary programs of this kind.

They were not in existnece. They were, in a realistic sense, the farthest thing from the minds of the draftsmen at that time. And while the case immediately concerns the issue of voluntary compliance programs, the contentions that have been made here before this Court cut much more deeply than that into the remedial fabric and fact of enforcement of Title VII.

The Respondents and, I regret to say, the Petitioner union, are asking the Court in this case to repudiate the numerous Federal Court decisions over the years that have upheld the propriety of the ordering of numerical race-conscious relief to rectify the effects of an employer's proven discrimination.

QUESTION: Mr. Wallace, if we accept Mr. Gottesman's position on behalf of his client, we don't need to decide whether you are right or wong as to the extent of a Courts' remedial power, do we?

MR. WALLACE: It would be possible for the Court not to reach that issue.

QUESTION: It would perhaps be improper for the Court to reach it.

MR. WALLACE: All of the parties are arguing on the basis of premises as to the symmetry or lack thereof between remedial orders, litigated decrees and consent decrees and--

QUESTION: That is precisely what Mr. Gottesman does not do. He eschews all of that. If he's correct, then the Court need not, and probably should not, reach the question of what a District Court could do by way of remedial order and need not and probably should not reach the question of the validity of the Executive.

MR. WALLACE: Your Honor, in his brief he asks the Court to hold the line of cases cited in Footnote 14 of our brief, on page 26, the wrongly decided--

QUESTION: That has nothing to do with his basic position, does it? Or do I wholly misapprehend it?

MR. WALLACE: Well, I think that his position can stand without it. Obviously, the results stand without it, because we argue for the same result. However, the premises that he was stating orally to the Court are not easy to reconcile with the first major decision of this Court under Title VII, Griggs v. Duke Power Co, which rejects the notion that its invidious and evil purpose is an element of the prohibition.

It seems to me a revisionist view of all of the holdings under Title VII.

QUESTION: Well, that dealt with testing, didn't it, Griggs?

MR. WALLACE: It dealt with testing, but it said that even unintentional disparing effects on racial groups can be a violation of the Act despite the proved lack of evil purpose or invidiousness or any of the other terms that were just submitted to this Court as properly to be read into Section 703(a) and 703(d).

QUESTION: Let's assume, and I think Mr. Gottesman accepted that this on its face is a gross violation of Title VII. His claim simply is that he has a complete defense, that, on inspection, it turns out not to be a violation of Title VII.

MR. WALLACE: Well, we agree with the bottom line, yes.

QUESTION: I mean under Griggs, this, obviously, under the literal language of the statute, if you will, is, on its face, a gross violation of Title VII. And his position is that under this particular context, it turns out not to be a violation of the statute at all.

And, if he's correct, then what possible business is it to the Courts in this case to reach the question of what would an appropriate remedy be in the event of a violation of Title VII. Certainly, what business is it of this Court to reach the validity of the Executive Order?

MR. WALLACE: Well, it is difficult to decide the case in isolation from other holdings interpreting Title VII in a comprehensive way.

I think it's quite true that, narrowly speaking, the Court could avoid the question whether programs of this type could be approved by consent decrees, as they have in many cases, or whether they could be ordered as remedies in litigated cases. The question has been put to the Court many times in petitions for certiorari arising from the eight Courts of Appeals that approved such relief, and the Court has always declined to hear the cases.

QUESTION: In Griggs, Mr. Wallace, did not the Court note that there was no question about any bad faith or bad

motivation of the employer? But, on the contrary, the employer had been conducting educational programs to bring its minority employees up to high school equivalency?

MR. WALLACE: That is correct. Nonetheless, the employer violated the Act.

QUESTION: The case turned on the impact, not on the intention.

MR. WALLACE: That is correct. And the Respondent here has submitted the same type of prima facie case about impact on him through the use of a racial criterion, that requires a response. And it has been, in our view, rebutted by the circumstances by which this program arose. And the reason for which the program was adopted. But I find it very difficult to reconcile with the interpretation of Title VII that this Court has adopted with the legislative history of the 1972 revisions to Title VII, and the consistent views of the agencies that have administered Title VII, the idea that this is not a prima facie showing of violation ofTitle VII, because it was not done by invidious purpose. And that the broad prohibitions are to be read more narrowly and that somehow by negative implication every employer is left free, which is the reading of 703(j) that the Court has been invited to make. Every employer is left free to achieve balance with respect to every element of his workforce by race or by sex. And so that anywhere where Blacks are over-represented or women are

over-represented or men are over-represented, he is free to rectify that without any reasonable basis to think that he could be liable to an action under Title VII or whether he might be violating the Executive Order program. That's what the Court is being invited to say and it goes far toward undermining both the Federal interpretation of the prohibitions and what Congress was trying to do, and the effectiveness of any possible enforcement.

The contention is what the Court referred to in Albemarle Paper Co. as the spur or catalyst that encourages voluntary compliance is to be removed and the Court is to take it on faith that the employers like Kaiser will continue to spend hundreds of thousands of dollars even though there is no possibility that a Court could order them to adopt similar programs and that unions will continue to agree to such programs.

QUESTION: Are you arguing that the collective bargaining contract violates Title VII?

MR. WALLACE: The contract is consistent with Title VII. That is our view. What I am arguing is that the interpretation that the union has asked this Court to make of Title VII would undermine effective enforcement of Title VII.

Now, it's possible, as Mr. Justice Stewart has suggested, for the Court not to reach that question. But, nonetheless, the interpretation that was just stated orally

is the one inconsistent with effective enforcement of the prohibitions of Title VII.

QUESTION: What you are saying is in a case involving a voluntary agreement between management and labor, we should go ahead and decide what Courts could do if the matter were litigated.

QUESTION: And a violation were found.

QUESTION: And a violation was found.

MR. WALLACE: No, a symmetry between the relief the Courts can order and the voluntary programs that can be entered into.

QUESTION: Why?

MR. WALLACE: Because, otherwise, the use of a racial criterion presents a problem. The tenor of the questioning is that somehow we are not supporting the validity of the programs. But our submission is quite to the contrary, that the way in which we are supporting the validity of the program, the rationale that will make it possible for such programs to continue in existence, to be expected to continue in existence.

QUESTION: Under your submission, for how long may the programs continue ?

MR. WALLACE: Well, this program has many features that are consistent with a proper remedial approach under Title VII. It's a program that's finite in that it has a one for one obligation that will expire when the local workforce ratio

is reflected in the plant. In this case, it's 39 percent.

QUESTION: In your view, then, Mr. Wallace, when it reaches -- when it finally does reflect the community or the composition of the workforce, may the company and the union then agree to maintain that balance, consistent with your position?

MR. WALLACE: Well, that would create a difficult problem under Title VII. You are turning away people from employment on the basis of their race.

QUESTION: Do you care to say yes or no it would or wouldn't violate Title VII?

MR. WALLACE: It's hard to say just on that bare hypothetical, but I will say that if a person Black or white is turned away from employment on the basis of his race because the employer wants to maintain a certain balance, there has to be more of a justification than the negative implication --

QUESTION: I take it your answer is that in your present submission is that that would violate Title VII?

MR. WALLACE: On the face of it, it is a prima facie violation. Unless it is justified, there is a violation there.

This program represents what to us is an example of the way Title VII should operate in a litigated decree, a consent decree after a voluntary program

QUESTION: And after a violation.

MR. WALLACE: In the case of a voluntary program where

there is a reasonable basis to think that a violation could be shown unless something was done to rectify it.

QUESTION: Well, didn't both sides, labor and management, agree that they were operating with a segregated workforce?

MR. WALLACE: Yes. And they agreed on this program and it was a reasonable program for them to agree on under the circumstances. And I want to say why, if I may.

We have here a situation where there was a 46 percent local population, 46 percent Black local population and the local labor force was 39 percent Black. And at the time this program was agreed to, less than 2 percent of the skilled craft workers in this plant were minority. And this has been changed in the statistics set forth in the Appendix, in the chart at page 167. The result of the operation of the program, this has been increased to 4.43 percent, in a situation where not only the total workforce of 39 percent, but the figures that we have been able to glean from extensive data show that even among skilled craft people in the area you would expect 15 or 20 percent minority.

And a similar program was adopted that changed the representation in the plant as a whole, from some 10 percent minority over a course of five years, 1969 to 1974, to 14.8 percent minority.

The program was one that was adopted in an atmosphere

where the employer was definitely -- had a reasonable basis to think that he was subject to the making of a prima facie case that he was guilty of employment discrimination. And, as a matter of fact, the Parsons Case brought against a neighboring plant of Kaiser's based on very similar statistics, the District Court held that a prima facie case had been shown.

The actual selection of people under the program, while it was 50-50 for the training program, at the same time skilled craftsmen were being hired outside the training program, 22 were hired that year from the community at large and only one was Black, 21 were white; 7 Blacks and 6 whites were taken into training programs, so that altogether the entry into craft jobs under the program in its first year of operation was, in a sense, rather mild, it was about 23 percent minority.

The program offered new opportunities for white workers to enter the craft. It did not in any way abbrogate or establish seniority rights. You don't have the problem under 703(h) as you had in the Teamster's case.

QUESTION: You have covered all that in your brief, you know.

MR. WALLACE: Yes. And we believe that this program should be upheld as a reasonable response to the situation the company and the union were in.

QUESTION: Mr. Wallace, supposing that the Respondent and the Plaintiff here had come into court alleging the same

facts as he did in this case, I take it under your view, neither the Company nor the Union would be entitled to a summary judgment or motion to dismiss, they would have to come up with some evidence?

MR. WALLACE: That is correct.

QUESTION: Could you give us an example of what sort of evidence, what tangible types of evidence they could come up with that would meet the case?

MR. WALLACE: The kinds of evidence that I have been pointing to -- the Respondent's case here. Was your question related to a complaint by a minority worker?

QUESTION: The complaint in this case.

MR. WALLACE: The complaint in this case, the very evidence that I have been pointing to of the vulnerability of the employer to a suit. And we don't have--

QUESTION: How would you deduce such evidence in Court? I mean, you are the lawyer for the union or the lawyer for the company, how do you show in court that you are "vulnerable" to a suit?

MR. WALLACE: Well, the evidence was produced here, Mr. Justice. The witnesses for the company testified that they were concerned about compliance with the Executive Order program and about the possibility of lawsuits, that lawsuits had been brought elsewhere. The statistical evidence was introduced that I just reviewed to show a sufficient disparity in itself

would be a prima facie case under this Court's holding in Dothard v. Rawlinson, so that the evidence was actually in the case. This is an example of how the evidence can be shown that does rebut a prima facie case. A prima facie case was rebutted on this record. And that is the reason why the program should be upheld.

QUESTION: Thank you, Mr. Wallace. Do you have anything -- oh, we're not ready for you yet, Mr. Powers.

Mr. Fontham.

ORAL ARGUMENT BY MICHAEL R. FONTHAM

ON BEHALF OF RESPONDENT BRIAN F. WEBER

MR. FONTHAM: Mr. Chief Justice, and may it please the Court:

My name is Michael Fontham, and I represent the Respondents in this case, Brian Weber and the class of the non-minority employees at the Kaiser plant in Gramercy, Louisiana., who were eligible to bid for on-the-job training programs.

The issue presented in this case is not the issue stated at the beginning of the argument. But, instead, it is whether a company or labor union may institute a 50 percent racial quota for entry in craft training programs that discriminate against non-minority employees and prefer minority employees, solely to achieve a certain statistical ratio, and in the absence of any past discrimination by the company or

the Union against the preferred individuals and, in fact, in the absence of any past discrimination at the plant in question.

In the course of my argument, I would like to, first of all, address three factual areas which I think are of concern and have not adequately been covered by Mr. Wallace, and I have an opportunity to do so, and some of the arguments raised by my opponents.

First of all, with respect to the facts, I think it is important to note what the operation of the quota was in this case because Kaiser Aluminum had instituted training programs in the past and the basis for entry into those training programs, in addition to the skills required, were the absence of physical handicap, with seniority. And that seniority criterion was a plant-wide seniority criterion at this plant available to all individuals, whether they were white or black or other minority -- whether they were male or female.

Every person who was hired at the gate of the Kaiser plant obtained his or her seniority status and was treated equally with respect to that seniority system. But, with respect to the craft training programs -- and I might add that the Union had been negotiating for its members to have these training opportunities. The members of the Union were unskilled laborers at the plant. And the opportunities presented by the training programs were considered very important by these

persons -- an opportunity to advance, to learn a skill, which skill can only be attained after years of training and schooling.

And so it was very important to these people who felt they could obtain higher wages, better working conditions and, even more importantly, more security. But, in addition to the seniority criterion for entry into the training programs, Kaiser Aluminum imposed a 50-50 racial quota, which said that for every non-minority individual who entered a training program, they must take a minority individual.

QUESTION: I don't understand that there is challenge to the idea that this is a quota program.

MR. FONTHAM: Yes, Your Honor, it certainly is a quota program.

QUESTION: Then I have misread some of the briefs here. Perhaps I'm confusing the Union's brief here with some of the Union's amicus briefs.

MR. FONTHAM: Your Honor, I think the only difference is that some of the parties choose to call the quota a race conscious program. But the fact is that the means of applying a race consciousness is a 50-50 numerical ratio, which has the effect of actually segregating the seniority line, making an all white seniority line and an all minority seniority line and for entry into the training programs, choosing the top person from each seniority line, which also has the concomitant effect of advancing members of

minority groups over whites in the seniority line because there were more whites in the seniority line.

QUESTION: Mr. Fontham, these briefs, both the parties' and amicae are sprinkled with euphemisms, but we can't decide this case on what something is called, but, rather, on what it is.

MR. FONTHAM: Absolutely, Your Honor. And I think--

QUESTION: And I don't think there is any -- according to the Chief Justice -- real question or controversy here as to what this program is and what it provides.

MR. FONTHAM: Yes, Your Honor.

The point that I'm trying to make, Your Honor, is that the effect of the application of the numerical ratio was to--

QUESTION: --discriminate against some white people.

MR. FONTHAM: Not only to discriminate, Your Honor, but, in addition, to take away their accrued seniority rights--

QUESTION: Yes.

MR. FONTHAM: --they had been given through years of service to Kaiser.

QUESTION: Yes, I don't think there is any question.

QUESTION: How many years was Weber there?

MR. FONTHAM: Your Honor?

QUESTION: How many years was Weber there?

MR. FONTHAM: Your Honor, Mr. Weber personally had been an employee of the plant, I believe, since 1968 or '69.

QUESTION: That's that long line of seniority he's talking about?

MR. FONTHAM: Yes, Your Honor, the seniority system--

QUESTION: It's very clear, in any event, Mr. Fontham, that even if Mr. Weber had not been accepted in this program because there might have been white people with more seniority, or people with more seniority, the fact is that some people were excluded from acceptance because they were white, and I think that's--

MR. FONTHAM: That's correct, Your Honor.

QUESTION: I think there's no controversy about that in this case.

MR. FONTHAM: That's correct.

Secondly, I would like to address the question of the supposed or alleged prima facie case--

QUESTION: Just a second, Mr. Fontham. You opened by saying you did not think the issue was the one phrased at the outset of argument.

MR. FONTHAM: Yes, Your Honor.

QUESTION: I don't quite understand that. You do agree, don't you, that the only question here is whether this program is prohibited by Title VII?

MR. FONTHAM: Absolutely, Your Honor.

QUESTION: That's the only question here.

MR. FONTHAM: Yes, Your Honor; that's correct.

QUESTION: I didn't understand what you meant when you said the issue was different.

MR. FONTHAM: Well, Your Honor, I was simply saying I would phrase it differently than the way Kaiser's attorney phrased it.

Secondly, with respect to the question of alleged or assumed or, I believe the word that was used in this case is "arguable" past discrimination. Because I think the important fact with respect to the record is that two Courts have already held that there is no past discrimination at Kaiser.

QUESTION: And what evidence was there on the other side?

MR. FONTHAM: Your Honor, the Union--

QUESTION: There was no evidence, was there? Who put on evidence on behalf of the Negro?

MR. FONTHAM: Your Honor, the Union--

QUESTION: There was no evidence. Who represented them?

MR. FONTHAM: The Black members at the plant, Your Honor--

QUESTION: The Union represented both the Negro and white. Who represented the Negro?

MR. FONTHAM: Your Honor, there were no Intervenors if that's the question. Every pleading in this case was sent to the National Office of Equal Employment Opportunity Commission.

QUESTION: What I'm talking about is the findings of these two Courts. It wasn't based on testimony.

MR. FONTHAM: Yes, Your Honor, it was based on testimony. It was based on an analysis of the testimony of the Kaiser officials; statistics with respect to what the work force was comprised of.

QUESTION: Would you expect Kaiser to come in and say they openly discriminated against Negroes?

MR. FONTHAM: No, Your Honor, I don't expect them to say that.

QUESTION: What do you expect them to say then?

MR. FONTHAM: What I'm trying to say, in the District Court, Your Honor, the Union filed two briefs on the issue.

QUESTION: Sir, my question was not "briefs"; it was "evidence" -- testimony -- normal evidence.

MR. FONTHAM: Your Honor, it's the same argument that the Government raised in this case, the asserted statistical disparity, which I would like to address. So I do think, Your Honor, that the fact or the question of Kaiser's past employment practices was covered at the trial. The evidence established that Kaiser had had a plant-wide seniority system,

and that the seniority system granted seniority rights to minority--

QUESTION: To 2 percent of its employees.

MR. FONTHAM: Well, Your Honor, to all employees.

QUESTION: Two percent of its employees were Negroes.

MR. FONTHAM: Right, Your Honor, but just simply in the crafts.

QUESTION: Two percent in the crafts.

MR. FONTHAM: Two percent of the skilled craftsmen in the plant.

QUESTION: That's what we're talking about.

MR. FONTHAM: Yes, Your Honor.

QUESTION: So they actually gave seniority to 2 percent.

MR. FONTHAM: Well, Your Honor, the seniority system was applicable with respect to the unskilled laborers of the plant. The craft positions at the plant are in a separate category, and two percent of those persons in the crafts positions were members of the minority group. But the record establishes that Kaiser had taken a number of affirmative action measures prior to the institution of this racial ratio to try to obtain more minority craftsmen. Kaiser had a separate craft application file which was for Blacks only. And they went to that Black application file first whenever an opening in the craft postions came up.

QUESTION: And they couldn't find but 2 percent?

MR. FONTHAM: Yes, Your Honor. Kaiser advertised in predominently minority newspapers in the area. Kaiser instituted the establishment of goals and timetables in conjunction with the requirements of the Office of Federal Contract Compliance. And the fact is, and the evidence in this case establishes, that persons who were trained craftsmen with the requisite skills were not available in the area. And there was a statistical realization, if I can use that term, that the number of minority craftsmen in the Kaiser plant was no smaller than available craftsmen in the work force at large. The simple fact is that for whatever reasons, racial discrimination or other reasons, minority craftsmen were not available and Kaiser was not able to get them.

And, as a result of that -- I believe Judge Wisdom's opinion said that Kaiser made good faith efforts, laudable efforts to try to seek and find minority craftsmen, but it was unable to do so. So the record reflects that there was no past discrimination.

As to a possible argument of discrimination based on pure statistical data, and the fact they compared persons with the requisite skills, they were different comparisons. As for the evidence in this case, Your Honor, we did put on the evidence about Kaiser's employment practices in the past. I think if you had heard the Director of Equal Employment Opportunity

at Kaiser and his statements on the question of labor relations in the United States, I think you would have found that he was a very sincere, forthright and honest individual, and spoke very convincingly.

QUESTION: Do you assume I didn't read it?

MR. FONTHAM: No, Your Honor, I don't assume that. I said "heard". And I think that that does make a difference. But I think the important thing that has to be remembered is that this was not -- the evidence is unambiguous with respect to why this was done -- it was not done as an asserted remedy. This was done because Kaiser felt the need under OFCC requirements or whatever to voluntarily take action to change the statistics.

The fact is that Kaiser knew very well why craftsmen were unavailable and they were not under-utilized if the comparison was persons with the skills. But Kaiser knew that the Government likes a -- if you have to compare 2 percent to an overall general availability of minorities, which was 39 percent, Kaiser said, "We've got to change the ratio."

And what they did was they chose this 50-50 ratio for selection as a means of achieving an overall 39 percent representation.

QUESTION: Mr. Fontham, let's suppose that just on the figures or on the statistics a plaintiff -- a Black plaintiff -- could have made out a prima facie case that

would have required Kaiser to put on some evidence, that wouldn't make any difference in your--

MR. FONTHAM: It would not, Your Honor, but I think I want to make a point as strongly as I can that we're not talking about even that situation. The fact is whether it would make a difference or not is not important because Kaiser never undertook an analysis at the Gramercy plant.

QUESTION: I know, but people disagree with you on that. But, as I understand your position, it wouldn't make any difference in this program, if Kaiser sat down and when they looked over the situation said that, in their opinion, a prima facie case in discrimination could be made out, you would still say that this response would be illegal under Title VII?

MR.FONTHAM: Absolutely, Your Honor.

I think that with respect to Your Honor's statement, Your Honor, the statement made by my opponents is rather artfully worded in that it says, "Kaiser could have believed". It doesn't say that Kaiser undertook an analysis and came to that determination.

QUESTION: No, I know it. They freely deny -- they refuse to admit that a prima facie case could have been made out.

MR. FONTHAM: Yes, Your Honor, and it couldn't have, if you used the persons with the requisite skills in the

labor force. The only way that you could have made out a prima facie case, in this instance, would have been to compare the statistics for skilled craftsmen, which the National Bureau of Apprenticeship says can take up to five years of training and schooling, and which Kaiser spends $15,000 to $20,000 per year per person in the training programs, including on-the-job training and significant schooling.

If you took that statistic, the 2 percent, and compared it to everyone in the labor force who is a member of a minority group, you could have had a prima facie case; but this Court has said you are not supposed to do that. I believe it said that. And it said that the applicable comparison in trying to show a prima facie case is persons with the requisite skills. So you can compare lawyers in the law firm with persons who have a law degree and are qualified to be a lawyer, or a doctor in a medical clinic with persons who are qualified to practice medicine in making a determination whether the employer had discriminated.

But, in this case, what the Company and the Union did was they set their goal, which is what they call it, as the ultimate place to which they wanted to go.

QUESTION: Mr. Fontham, let me interrupt you just a minute. As my Brother Stewart has said, the case and the briefs and the arguments are sprinkled with euphemisms. You

have used the term "remedy" once and your brothers and sisters have used it, and you now use the term "goal". What do you mean by "remedy" and what do you mean by "goal"?

MR. FONTHAM: Okay, Your Honor, let me say, hopefully, I said this was not a remedy. I didn't use the term "remedy". When I say "remedy", this is what I mean: You have an individual, like this Court has said on several occasions, and you assertedly or allegedly, or you even admit that you have done something to that individual and, therefore, you remedy that by returning that individual to where he would be. You may pay him some money or you may put him in his rightful place in the seniority line or whatever.

I think that it is incorrect to say that -- and I think it is very unfortunate that the argument is being made here that because a person is a member of the minority group someone can assert or allege you are doing something against--

QUESTION: When you use the word "remedy", you mean you settle a claim that a particular individual had against you for damage that you had done to him?

MR. FONTHAM: Yes, Your Honor. But it doesn't have to be in the legal technical sense, necessarily. I just think that the word "remedy" has to be confined to the individual as opposed to a class.

If somebody says that somebody in a class was discriminated against, and we pick out people that everyone in

this case concedes were not discriminated against -- even the Government says they are not identified victims of past discrimination.

QUESTION: By Kaiser.

MR. FONTHAM: By Kaiser, yes, Your Honor, that's true.

QUESTION: Who is this that agree they weren't victims of anything? Did they go to schools in Louisiana?

MR. FONTHAM: Yes, Your Honor. There is no doubt, and I fully concede that societal discrimination has occurred--

QUESTION: I thought so.

MR. FONTHAM: --with respect to Blacks in this country and, particularly, in Louisiana.

QUESTION: I thought you did, but you sort of went over the other way, didn't you?

MR. FONTHAM: Well, Your Honor, I think--

QUESTION: I remember what you said before.

MR. FONTHAM: We have in this case -- what is happening, and what we object to, is that the Company, the Union and the Government have decided that the social goal -- and I think it's a laudable social goal -- uplift minority groups, but how they decided to do it--

QUESTION: But don't they also decide that in this Bill?

MR. FONTHAM: No, Your Honor. Well, yes they did--

QUESTION: Okay.

MR. FONTHAM: --in the sense of eliminating barriers. Do not discriminate in the future is what Congress said and it is what Your Honor said in McDonald, that no discrimination can occur unto any individual on the ground of race. And I think, Your Honor, Congress has said affirmative action shall be taken to break down barriers to allow everyone an equal opportunity.

QUESTION: In my opinion, McDonald doesn't help you, but go right ahead.

MR. FONTHAM: Your Honor?

QUESTION: Yes, sir, I said you said "McDonald", but in my book, McDonald doesn't help you.

MR. FONTHAM: Well, I'm very sorry to hear that, Your Honor.

(Laughter)

QUESTION: Mr. Fontham, you perhaps -- do you have in mind the hypothetical amendment to Title VII that I outlined to your friends in their oral arguments?

MR. FONTHAM: Yes, Your Honor.

QUESTION: Do you agree that if Congress passed such an amendment or such a statute that an employer could proceed to try to achieve racial balance by programs of this kind?

MR. FONTHAM: I think, Your Honor, that the obvious

question would be State action, whether there was Federal Government or State action that might create a constitutional problem.

QUESTION: What kind of State action? Just passing a statute -- State action?

MR. FONTHAM: Well, Your Honor, the question is would the Office of Federal Contract Compliance be enforcing it. But, if it's not, if Congress wants to return the situation to pre-1964, I think you're absolutely right, they could do that, and employers and unions could try to achieve a social goal which would erase discrimination. I certainly hope that Congress doesn't decide to do that, but I think Congress has definitely, as of now, decided that there should be no race discrimination.

And what I was going to say previously is what Kaiser, the Union and the Government apparently decided to do in this case, Your Honor, is to achieve a social goal, which is quite laudable, but, by the same token, Kaiser is not paying the cost, nor is the Union. Instead, the entire cost of this program is placed on the shoulders of the non-minority members in the unskilled labor force at Kaiser. And these persons, with respect to these persons, I don't even think that the word "remedy" in the boadest sense could be applied because they work side by side with the minority group members. They have the same seniority rights. They have the same opportunities

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for advancement in the plant and, finally, the Company posts bids, with one of the bids saying, for this opportunity, it won't be seniority, but it says the sole criteria will be that only a member of the minority group can apply. And with respect to other bids, they enforce seniority with the bids. At least half of the persons they select will be members of minority groups. The one means of advancement under the Company-Union agreement is seniority, after years of service with the employer and the union, and it's the most -- I think even this Court has said, seniority is the most fundamental kind of right for a person who works in a labor force such as this -- is taken away. The accrued rights of the non-minority employee are simply taken away and race becomes the factor for determining who enters into the training programs, superimposed upon the seniority system.

And I believe that in view of this Court's decision in the Teamsters Case, or even in the case of finding of past discrimination, the Court is saying only with respect to individuals the Government must carry a burden of proof that the individuals here, by a preponderance of the evidence, that the individuals had been discriminated against in the past.

And in this case we have a pure out and out preference being granted to members of minority groups. We feel that under the cases decided by this Court and under Title VII, this

is illegal.

Title VII says in Section 703(a) -- and I will discuss the legislative history -- in fact, maybe I should do that first.

I think that the inferences drawn by the Union in this case are very difficult to adopt. I think that the Union demonstrates very, very substantially that there was nothing sporadic, and there was nothing infrequent about the statements of the supporters of Title VII with respect to the issue of quotas, with respect to the issue of preferences and of achieving racial balance.

The fact is that what happened when Title VII was passed was the opponents got up and they were there making claims which were regarded almost as outrageous by its supporters. And the claims were, well, this is for quotas to advance minorities, and the proponents saying this will permit attempts at achieving racial balance. And Senator Williams, Senator Clark and Senator Chase, the persons who were really behind it, saying, well, Title VII says no discrimination against anyone, whether you be a member of a minority group or a member of a non-minority group. And just from reading the legislative history of Title VII, I think that this is the thing that comes through the most clearly -- and all of them expressing the same thing -- the opponents saying we can have ratioes, the supporters saying

this is a non-discrimination statute that has prospective effect. It will allow the breaking down of barriers. Section 703(j) says you can't require quotas; they put that in here because the opponents were saying some Government entities will require quotas. That's what Kaiser and the Union thought the Government was doing in this case. And the supporters saying, "They can't do that. It will violate Title VII."

So what does the statute say that's applicable to this case?

It says that there can be no discrimination against any individual with respect to their employment opportunities on the ground of race, color, sex, national origin and the other factors.

And Section 703(d), what does it say? Because it's very important with respect to the argument this is a new program and a great opportunity for everybody.

Well, the fact is that Section 703(d) says that a company or a union or a joint labor-management body may not discriminate against any individual with respect to entering into training programs or with respect to the terms and conditions of training and opportunities provided under training.

And I think, from my own standpoint at least, the Court's decision in McDonald is related when considering the

construction of Title VII. McDonald came out of the Fifth Circuit. The Fifth Circuit had dismissed the case of a white individual who allegedly had been stealing and assertedly some minority employees were not dismissed. And the case was kind of decided by the Fifth Circuit in a fuzzy manner that left it open whether the white individual had any cause of action, number one, and, number two, whether the same standards were applicable to the white individual, because they might have construed the Fifth Circuit as having said there is a cause of action, but your review is different because of, possibly, the invidiousness or nastiness of the discrimination.

So the case was brought up here. And the Court said that, first of all, a white individual does have a cause of action under Title VII and frequently, and most importantly, the same standards are applicable as if that individual were a member of the minority group. And if you apply the same standards to this case, why are the Company and the Union imposing discriminatory quotas against members of the non-minority groups to achieve what they thought was a desirable ratio in the work force?

QUESTION: I think that's not the Union's position, but I think the Union's position would be that if there were a conspicuous disparity in the work force and that 90 percent, or 95, 98 percent of the craft employees were

Negroes and only 2 percent white, I think, as I understood the Union's position, it would be that the employer and the Union could cooperatively and voluntarily agree to put in this kind of a program until a more representative work force were in place.

MR. FONTHAM: Yes, Your Honor.

QUESTION: Did you understand it the same way?

MR. FONTHAM: Well, I'm not sure I--

QUESTION: That's what I understood.

MR. FONTHAM: To me there are differences between what the Union argued in oral argument and in the brief.

QUESTION: There are differences between the Union's position, the employer's position and the Government's position.

MR. FONTHAM: No doubt, Your Honor.

QUESTION: It's very clear.

MR. FONTHAM: I think, however, that if the Union and the Company did that that there's no doubt that if they discriminated against Negroes or other members of the minority groups it wouldn't last a minute in this Court or any other Court -- in a Federal Court.

QUESTION: You know more than I do if you know that.

(Laughter)

QUESTION: Mr. Fontham, what's your answer to the Union's argument that 703(j), when it says that nothing contained in this subchapter shall be interpreted to require any employer --

attaches special significance to the word "require" and, by implication, permits it, although it does not require it?

MR. FONTHAM: Yes, Your Honor, I think, in the first place, that's solely inference. If Congress had wanted to say it's permitted, they could have.

In the second place, you cannot possibly read that provision in conformity with Section 703(a) and Section 703(d), the requirements saying there has to be non-discrimination against anyone. Because as long as the attempt to achieve a racial balance discriminates against one individual, then it would be wrong under Title VII.

I think also that the Union's argument really refers to the fact that the supporters of Title VII finally said if the opponents in this say this and say this and say this, we'll just put a provision in the statute. I don't know exactly what term they used, but when Senator Humphrey explained it, and explained what Senator Jackson wanted, he said this does not change the substance of the statute. We are trying to answer the contention that this will be required by the Government.

QUESTION: You say,in effect, that the explicit language of (a) and (d) prohibits the drawing of the implication that the Union draws from (j)?

MR. FONTHAM: Yes, Your Honor. I think also the

decisions of this Court pretty much precluded drawing that inference, because the decisions of this Court indicate that you cannot discriminate against individuals.

QUESTION: Title VII now applies to local governments, I take it?

MR. FONTHAM: Your Honor, it applies, Iknow, to State and local governments, and I'm not sure about the extent to which it applies to the Federal Government.

QUESTION: Well, to State and local government--

MR. FONTHAM: Yes, Your Honor.

QUESTION: It does. Suppose a school district had decided to integrate its faculty or to have racial balance in its faculty, they just voluntarily decided to have racial balance in their schools and voluntarily to have racial balance among their faculty--

MR. FONTHAM: Yes, Your Honor.

QUESTION: --I take it your position would be that that would violate Title VII insofar as the faculty was concerned.

MR. FONTHAM: Yes, Your Honor, because this Court has said so in the Cork Case. It is clear that the obligation imposed by Title VII is to provide an equal opportunity for each applicant, regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.

QUESTION: The Union argues that there's a tie between

Title IV and Title VII and that in the Title IV discussion, it was perfectly clear that Congress wasn't objecting to voluntary decisions of school boards to integrate their faculty this way.

MR. FONTHAM: Your Honor, I have to admit I did not read all the legislative history of Title IV. I don't think the fact they were passing Title IV at the same time they were passing Title VII, however, would be a valid ground for this, it seems to me, extremely tenuous inference throughout the language that on its face acts like it's almost done, that you can't require a racial ratio in the work force.

QUESTION: You can't avoid discriminating -- you can't avoid discrimination by discriminating. That's--

MR. FONTHAM: Yes, Your Honor.

(Laughter)

QUESTION: Thanks very much.

MR. FONTHAM: I think also, Your Honor, some of the other decisions of this Court support our side of this case. The decision of the Court in Griggs v. Duke Water indicates-- specifically stated -- that preferences, and what we're talking about here is a preference that discriminates -- to integrate minority or majority is exactly what is proscribed by Title VII.

The decision of this Court in City of Los Angeles v. Manhart I think is very important because, in that case, although it wasn't a race discrimination case, the Court stated

that the emphasis in Title VII is with respect to the rights of the individual. And it is very clear that these rights are personal rights. And what we have in this case is the asserted justifications being brought up on a class basis -- a minority class. The claim is made because tney are members of a class, and yet, at the same time, we have discrimination against white workers on whom it has the same kinds of economic impact -- on frustration, on earning potential, loss of an opportunity to advance, that 20, 30, 40 years ago it had on the minority groups in this country.

And, for that reason, we think that decision is important -- very important -- to this case. The emphasis should be on the individual.

In the Teamsters Case this Court made it very clear that emphasis is on the individual; that we cannot have in this country decisions that are made on the basis of race or class as long as Title VII is operative.

When the Government came in in the Teamsters and -- a little specificity here -- the Courts will say they are all members of the class and it's okay to grant them a remedy. The Court said prove that they were discriminated against in the past on an individual basis.

And this is one thing that is present in this case, considered by everyone, none of these persons had been discriminated against in the past by Kaiser. Instead, they had

equal rights with the non-minority members of the unskilled labor force, equal rights to advance, their seniority status was the same as everyone else's, except, in some cases, they had been working at the plant for less time. But with what Kaiser Aluminum did, persons who had worked at the plant for more time couldn't reach their economic expectations. They had to step back because Kaiser understood that the Government wanted to achieve a social goal, and Kaiser was going to help the Government do it by placing those costs on its workers, rather than bearing the cost themselves, or laying the costs on the Union. And that is another factor that is very important in examining this business of voluntary compliance.

The one thing I think the Courts are not willing to do is to allow employers and unions to be the arbiters of what Title VII means. Because one thing you can expect the Company to do and the Union to do, just naturally, and I'm not trying to say that this is done wrong -- I mean with the wrong intent, or whatever, but the fact is if they can put the cost elsewhere they will. And in this case that's what happened. They put the cost elsewhere, even if you assume there was an arguable case, they put the cost on the unskilled labor force, people who themselves had no training skills, who themselves wanted in the training program, who themselves had been construction workers.

QUESTION: If there was an arguable case, entering

into this program would not have prevented any of the plaintiffs in that arguable case from suing Kaiser or the Union, would it?

MR. FONTHAM: I think that's correct, Your Honor. I think one thing the Courts would not do is say because there was an asserted remedy, which, in fact, is a preference to one member of the minority group, that another individual who was actually discriminated against was barred from suing.

QUESTION: So in that sense neither Kaiser nor the Union, by entering into this agreement, immunized themselves from suits for actual discrimination.

MR. FONTHAM: That's correct, Your Honor. What they immunized themselves from was harrassment -- in their view, harrassment -- by the Office of Federal Contract Compliance.

In other words, the Compliance Officer of the Federal Contract Program, in preparing his utilization analysis, would focus on the statistics, and, if the statistics are low, then the possible things that can happen are the loss of Federal contracts, reporting you to the Justice Department, and publication of the Company's name in this manner, which all the Company lawyers think is a denial of due process, in the absence of a hearing on debarrment from future contract opportunities. And this is what they avoided.

This really had nothing to do with litigation at Gramercy. There may have been some litigation at some other

plants. But the main thing they were trying to do was get in compliance with the OFCC. They went even beyond what the OFCC has ever required and actually instituted a program that took away accrued seniority rights.

All that the Government has ever said it was for, previous to today, is these goals and timetables. And if you look at the back of the Government's brief in this case, they even say quotas aren't good. And if you look at what the OFCC said when they issued their guidelines, they said, "Ah, someone thought when we used numerical ratioes in our preliminary guidelines that we meant quotas, but we really didn't." So they changed it. So I think that's important too.

Everyone says to me, "Well, is this the end of affirmative action if Weber wins his case?" The fact is affirmative action has never gone so far as Kaiser and the Union wanted to go in this case. The Government has not said that quotas are all right -- certainly nothing of a fixed or rigid nature, enforcing its affirmative action programs.

And in addition to that, taking away of accrued rights has been stayed away from by the Courts, even in instances of terrible refusal to comply with proposals to break down barriers at the entry level. Sometimes the lower courts have said, "Well, if the State Police just won't comply, we'll make them hire a certain percentage for awhile."

But they have stayed away from doing that with respect to accrued rights. And that's even in a case where there is a violation of Title VII.

In this case, they go beyond any type of affirmative action method that has been used in the past or will be used -- a quota that takes away accrued seniority rights and, in the absence of any past discrimination.

And I think if the Court rules in favor of my side of the case, it doesn't change anything in terms of affirmative action -- actually or substantively.

On the other hand, if the Court says the Company and the Union or the Federal Government can require quotas, 50-50 ratio quotas, and, as in this case, that quota can discriminate against whites and take away their accrued rights, and the sole purpose of the quota is to achieve statistical parity -- and, in this case, if Your Honors will review the record, you will find that even after they achieve 39 percent representation in the work force, they will use that quota to meet minority minimums in the work force at large indefinitely -- in perpetuity, the exact statistical percentage of the minority group representation in the population at large.

QUESTION: We don't have that in this case though, do we?

MR. FONTHAM: Yes, Your Honor, we certainly do.

QUESTION: Well, we don't have to decide that in this case.

MR. FONTHAM: Well, I think, Your Honor--

QUESTION: You're projecting into the future.

MR. FONTHAM: Yes, Your Honor, it is projecting into the future. But I think what I want to say is that if the Court were to say that that's all right, I think there are agencies in place to enforce that decision, and that it may very well be that a lot of people have not wanted to overtly say that in the past because of what Title VII says that it's possible, and very likely, in fact, and especially in view of the proposed EOCC guidelines that were later changed, that the Government will require every contractor in the nation to achieve this kind of statistical parity, to have the perfect proportionate representation in the work force at large on a basically national scale.

QUESTION: Well, that would depend, the validity of that would depend upon the meaning of subsection (j), wouldn't it?

MR. FONTHAM: Well, Your Honor, I think the meaning of subsection (j)--

QUESTION: Isn't that correct? Wouldn't that question, whether the validity of that would depend, would it not, upon what is prohibited by subsection (j)?

MR. FONTHAM: Well, I think subsection (j) would

indicate--

QUESTION: Well, yes, but that would be the question, wouldn't it, what does subsection (j) mean? We don't have the meaning of that prohibition here because Government has not--

MR. FONTHAM: Yes, Your Honor.

QUESTION: --sought to enforce that; isn't that correct?

MR. FONTHAM: I think in this case what you have is what the Government requires -- that the employer will give a self-analysis. The Government doesn't actually explain--

QUESTION: But this was a voluntary action between the employer and the union.

MR. FONTHAM: Absolutely, I agree, Your Honor.

QUESTION: So, therefore, there has been no directive or prohibition or requirement by any agency of Government in that case; isn't that correct?

MR. FONTHAM: That's correct, Your Honor.

QUESTION: And subsection (j) only has to do with what may not be required by Government; isn't that correct?

MR. FONTHAM: Yes, that's correct.

QUESTION: And this case doesn't stem from anything that was required by Government, correct?

MR. FONTHAM: Well, the--

QUESTION: It was voluntary.

MR. FONTHAM: It was a voluntarily enacted program; that is correct, Your Honor.

QUESTION: Thank you.

QUESTION: I agree with that.

QUESTION: Mr. Fontham--

MR. FONTHAM: Yes, Your Honor.

QUESTION: In order to be correct on McDonald, page 281, footnote 8, this Court said, "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program. See brief for Respondents, Santa Fe 19, Note 5. And we emphasize that we do not consider here the permissibility of such a program." Clearly we said we weren't passing on an affirmative action program.

MR. FONTHAM: Your Honor, I recognize that.

QUESTION: Okay.

MR. FONTHAM: But, Your Honor, I think what the Court also said was that Title VII protects all individuals, whether they be members of a minority group or non-members of a minority group, and that those persons have a right to sue and to have rulings and to have non-discrimination on the individual basis under Title VII.

QUESTION: But we were not passing on an affirmative action program.

MR. FONTHAM: Well, Your Honor, I think that certainly--

QUESTION: Why do you think the Court put the footnote in there?

MR. FONTHAM : Your Honor--

QUESTION: Why do you think the Court put that footnote in there?

MR. FONTHAM: I think--

QUESTION: You think?

MR. FONTHAM: I think that the Court -- I don't know what I think.

(Laughter)

MR. FONTHAM: In closing, I think the main point I want to make is that individuals have been discriminated against in this case. They have lost their employment status. They have lost their seniority rights. The goals or desires of the Government or the Union or the Company may have been laudable or objectives that may raise some socially desirable point, but the fact is they can't try to accomplish that by discriminating against non-minority employees.

The statements of Title VII, which prohibit any discrimination against individuals, the legislative history of Title VII, where the statements are repeated and repeated and repeated and repeated that it would not permit preferences; that discrimination against non-minority group members is prohibited, indicate, and the decisions of this Court saying that white individuals' cases are to be tried under the same standards as cases brought by members of minority groups, all say that the class of employees in this case -- Brian

Weber and the other individuals who lost their seniority status -- who did not have the opportunity to enter the training programs, have been subjected to a violation of Title VII. And there was no past discrimination in this case that could justify that in any way.

There was no discrimination against the individuals who are being preferred and, in fact, there was no discrimination in the plant at large. The seniority system was available on a plant-wide basis to everyone -- everyone had an equal opportunity to advance; and minority members will advance through that seniority system and in some way minority group members will be fairly represented in the craft positions at that plant. It may not be as soon as some would desire, but you consider those plants cannot reach that point via discrimination against non-minority members.

QUESTION: Mr. Fontham, three or four times you mentioned Senator Humphrey in your references to the legislative history. I'm going to ask you an unfair question: Which side of the case do you think he'd be on?

MR. FONTHAM: Your Honor, I'm not sure. I think that there's a good chance that he'd be on my side.

QUESTION: You can't say for sure though?

MR. FONTHAM: (No oral response.)

MR. CHIEF JUSTICE BURGER: Mr. Powers, do you have anything further? You have about three minutes left.

REBUTTAL ARGUMENT OF NOYES THOMPSON POWERS

ON BEHALF OF KAISER ALUMINUM & CHEMICAL CORPORATION

MR. POWERS: Thank you, Mr. Chief Justice. I'll be very brief.

First let me say that this is not an unheard of form of affirmative action. In the two largest consent decrees which have been entered in this country, the AT & T consent decree and the steel industry's consent decree, this very form of action was proposed, was adopted by the lower courts and confirmed by the Court of Appeals.

Secondly, Mr. Chief Justice, I'd like to emphasize that we do not believe that a Congressional amendment is required to approve the type of action that was taken here. We think that nothing could be clearer than that Congress intended that this type of voluntary action be taken, consistent with the broad remedial purposes of the statute.

There has been the suggestion that counsel have engaged in euphemisms. Let me stress that we're not suggesting that this matter should be solved in terms of a label that's placed on it. And I would suggest that the action that the Company and the Union have taken here is entirely consistent with the words of this Court in Albemarle Paper v. Moody, when it suggested that it wanted to provide the spur or catalyst that causes employers and unions to self-examine and to self-evaluate their practices and to endeavor to

eliminate, so far as possible, the last vestige of an unfortunate and ignominious page of the country's history. We believe that what the Company and the Union have done in this case meets that standard.

We would suggest that far from debasing or taking away from Brian Weber and other white employees who lack craft experience at the Gramercy plant and in other Kaiser plants, what the Company and the Union did here enhanced their seniority. It gave them an opportunity along with Black employees and other minority employees and female employees to become craft-qualified. It set up that program in the best way the Company and the Union could find to both respond to the value and virtues of seniority and yet to make a demonstration that the old barriers for minorities and women had ended, and that the new opportunities promised by Title VII were, in fact, real.

We believe that this is a commendable example of what can be achieved through collective bargaining. But we're not here asking for commendation. We ask only that our right to continue this program be upheld.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 11:03 a.m., the case was submitted.)

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